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No. 83-624

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASHPEE TRIBE, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

Reply Brief for Petitioners

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Reply Brief for Petitioners

Introduction

Inasmuch as petitioners believe respondents' opposition briefs contain a number of fundamental legal and factual errors, petitioners will briefly reply to several of respondents' arguments.

Argument

I. RESPONDENTS' ARGUMENT THAT DOUBTS MAY BE RESOLVED IN FAVOR OF PRECLUSION DIRECTLY CONFLICTS WITH THIS COURT'S *RUSSELL V. PLACE* DECISION.

"The fundamental aspect of standing is that it *focuses on the party* seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added).

All the *Mashpee I* defendants and courts did was to focus on the party plaintiff:

> "Plaintiff filed an action to recover land wrongfully alienated in violation of federal law, not an action to determine whether or not it was an Indian tribe. *Defendants chose to make a major issue of the determination of plaintiff's status as an Indian tribe.*" *Mashpee I Plaintiff's Reply Brief to the First Circuit*, 2 November 1978, p. 16 (emphasis added).

And the district court's dismissal was understood by the *Mashpee I* plaintiff as being for lack of standing:

> "But the trial court also held that the jury's special verdict as to plaintiff's present status meant that plaintiff lacked standing to seek a remedy for that violation. The trial court dismissed for lack of 'standing' . . . ." *Mashpee I Plaintiff's Brief to the First Circuit*, 31 August 1978, p. 6.

The First Circuit agreed with the trial court and upheld dismissal of *Mashpee I* at the "threshold" for lack of "standing". 592 F.2d at 579, 581, 589.

Interestingly, respondent Commonwealth argued in the district court that plaintiffs lacked standing:

> "The Commonwealth asserts that neither the tribal claim nor the claim as individuals brings the plaintiffs within the zone of interests protected by the Non-Intercourse Act and consequently plaintiffs have failed to establish the standing necessary to maintain this action." *State Defendants' District Court Memorandum in Support of Their Motion to Dismiss*, 5 April 1982, pp. 5-6.

Now, of course, the Commonwealth has changed its tune and argues that we are dealing with "merits" and not with "standing" (Com. Opp. Br. 9-11).

Finally, respondent Town admits both *Mashpee I* courts determined the *Mashpee I* plaintiff did not have standing to sue (Town Opp. Br. 10 n.3). And while the Town also admits

there is at least some doubt as to what was decided in *Mashpee I*, it declares that doubt has been resolved *in favor of preclusion* by the *Mashpee II* courts:

> "If the *Mashpee I* opinions left any doubt as to the grounds for that dismissal, the opinions of the district court and court of appeals in this case conclusively resolved such doubt." (Town Opp. Br. 10).

Respondent Town's argument as well as the *Mashpee II* courts' "resolution of doubt" flies in the face of this Court's holding that all doubts are to be resolved *against* preclusion. *Russell v. Place*, 94 U.S. (4 Otto.) 606, 610 (1876).

Respondents' emphasis of the *Mashpee I* district court's throw-in phrase "on the merits" is misplaced:

> "(W)e note at the outset that the court had already found that it had no jurisdiction over the action, so that it had no power to render a judgment on the merits against either party." *Dassinger v. South Central Bell Telephone Co.*, 505 F.2d 672, 674 (5th Cir. 1974).[1]

Respondents further contend that because *Mashpee I* was tried to a jury for forty days[2] the decision must have been "on the merits". However, this Court had held that standing dismissal may take place at any stage, even after a trial.[3] *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31 (1979).

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[1] Under *Russell v. Place*, the very fact the *Mashpee I* district court used the terms "merits" and "standing" in the same sentence raises a doubt which must be resolved *against* precluding a second action.

[2] Petitioners have argued the entire *Mashpee I* procedure was unprecedented and gross legal error. *See* Pet. generally.

[3] The purported jury trial itself was to determine standing, not merits: "The *threshold issue* of tribal existence was severed for separate trial by order of the court." *Mashpee I*, 447 F.Supp. at 943 (emphasis added).

II. RESPONDENTS' ARGUMENT THAT A FINDING OF "NO TRIBE" IN THE FIRST ACTION BINDS THE TRIBAL MEMBERS IN THE SECOND ACTION IS, AS ONE OF THE CIRCUIT JUDGES COMMENTED, A "BOOTSTRAP OPERATION".

Respondents argue that even though Mashpee I determined there was no tribe, the individual *Mashpee II* plaintiffs are bound by the prior judgment *against their tribe* (Com. Opp. Br. 12; Town Opp. Br. 13).

At the hearing below, one of the Circuit Judges referred to this argument as a "bootstrap operation". Nevertheless, the First Circuit later adopted this bootstrap argument without explanation when it stated "the interests of the tribe and its members were fully and fairly represented" (Pet. App. A2).

In all of respondents' cited cases (*see* Town Opp. Br. 13), there was no challenge to the Indian tribe's existence or standing.[4] Thus, presumably the courts determined the Indians' claims on the merits. For this reason, all of respondents' cases are inapposite.

Instant petitioners' situation is more nearly analagous to that of the Pueblo Indians at the turn of the century.

In *United States v. Joseph*, 94 U.S. 614 (1876), this Court, noting that the prior sovereign, Mexico, had made the Pueblo Indians of New Mexico citizens and had granted the Indians their lands in fee simple, held the Pueblos did not constitute Indian tribes under federal guardianship and their lands were not subject to federal alienation restriction.

But almost *four decades later*, *United States v. Sandoval*, 231 U.S. 28 (1913) overruled *Joseph* because statements by the territorial court there relied on "are at variance with other recognized sources of information, now available." 231 U.S. at 49. *Sandoval* held the Pueblos *were* federal Indian

[4] Respondent Town, who successfully challenged the *Mashpee I* plaintiff's standing to sue, is judicially estopped from taking advantage of cases where standing was not an issue and a judgment on the merits issued. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982).

tribes and their lands *were* subject to federal alienation restriction.

Instant petitioners now, are in much the same position as the Pueblos were after *Joseph*.

Because of the *Mashpee I* defendants' uncontested jury demand (Pet. 11-12), and because crucial federal and state documentation establishing petitioners' status as a matter of law was never considered by a federal judge (Pet. App. D), petitioners believe their tribe and their lands have been denied the federal protection they are entitled to as a matter of law.

If in *Sandoval*, this Court was willing to consider "other recognized sources of information" not brought to its attention in *Joseph* and overrule after a forty year lapse, there was absolutely no reason the lower courts should not have examined instant petitioners' new bases for standing two years after *Mashpee I* was dismissed. In fact, the *Joseph* Court likened the Pueblos' condition to that of northeastern Indians such as the Senecas and Oneidas of New York. 94 U.S. at 617. Just as the Pueblos were under Mexico's guardianship and held their lands subject to sovereign alienation restriction before entering the Union, so the New York and Massachusetts tribes were under first Crown then State guardianship with sovereign alienation restriction on their lands when the United States Constitution became operable on March 4, 1789.[5] So if the Pueblos are federally protected, instant petitioners are likewise entitled:

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all dependent Indian communities* within its borders, whether *within its original territory* or ter-

[5] The extent of state power over Indian affairs even during the Confederation period has been questioned. *See Oneida Indian Nation v. New York*, 691 F.2d 1070 (2nd Cir. 1982).

ritory subsequently acquired, and whether within or without the limits of a State." *United States v. Sandoval*, 231 U.S. at 45-46 (emphasis added).

Accordingly, petitioners do not believe this Court should allow the First Circuit to doom the Mashpees to oblivion by refusing to allow the Indians to cure their standing problem.

III. The Mashpee Tribe Is a Politically Recognized, Non-Terminated Federal Tribe and Respondents Are Estopped from Denying Its Existence.

Respondent Town, pointing to the federal defendants' denial of "acknowledgment", disputes the fact that the Mashpee Tribe is federally recognized (Opp. Br. 16).

To begin with, the federal documents included in "Appendix D" to instant petition show the Mashpee Tribe not only was officially listed by the Bureau of Indian Affairs (BIA) and its predecessors as an Indian tribe of the United States, but also was repeatedly recognized by respondent Commonwealth of Massachusetts. And as the federal government recently admitted, neither the Mashpee Tribe nor its Reservation have ever been federally terminated (Pet. App. D-2). Thus, the Tribe has every right to be on the current BIA list.[6]

Such a situation, however, is not without precedent. In *City of Saulte Ste. Marie v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980), it was pointed out that because of "earlier [BIA] errors and omissions" the Chippewa Tribe, which should have been federally recognized in 1934, was overlooked. But the court, after discussing Chippewa history including federal recognition during the 1800s, held the Secretary of the Interior acted properly when in 1972 he subsequently recognized the Chippewas.

In short, the current official BIA list is not etched in stone and the Mashpees' present predicament is akin to that of the Chippewas in *City of Saulte Ste. Marie v. Andrus, supra.*

[6] Most of the tribes listed along with the Mashpees on the older lists are included on the current BIA list. *Compare* Pet. App. D with 44 Fed. Reg. 7234-37 (February 6, 1979).

Further, insofar as the federal government, the Commonwealth and those claiming under the State argue the Mashpees are not a tribe, they are absolutely estopped from doing so.

In *Larson v. Valente*, 456 U.S. 228, 239-241 (1982), the state, which had acknowledged an entity's existence, attempted to deny existence during litigation. This Court held the state was absolutely estopped from following this course of double-dealing. The same rationale applies in the instant case.

IV. Respondent Commonwealth of Massachusetts, Not a Party in the First Case, Has Offered No Reason Why It Should Benefit from the Doctrine of Res Judicata.

Respondent Commonwealth baldly asserts *Mashpee II* was brought against "virtually the same defendants" as were involved in *Mashpee I* and therefore the First Circuit properly applied res judicata (Com. Opp. Br. 9).

As the Commonwealth knows full well, it was *not* a defendant in *Mashpee I*. Nor does the State argue it was in privity with any *Mashpee I* party. In fact, the *Mashpee I* defendants attempted to join the Commonwealth as a defendant but the State successfully opposed that motion. *See Mashpee I*, 427 F. Supp. 899, 904 (D. Mass. 1977).

Thus, there was absolutely no justification for the First Circuit's unreasoned application of res judicata in favor of the Commonwealth (Pet. 9 n.1).[7]

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[7] Petitioners' claims against the Commonwealth were dismissed by the district court without hearing or explanation. Though petitioners brought this fact to the First Circuit's attention, it was ignored along with the parties' 162 pages of briefing.

V. TWO WEEKS AFTER THE DISTRICT COURT DISMISSED THE INDIANS' CASE, IT ISSUED A MEMORANDUM CONTRADICTING ITS PUBLISHED OPINION.

Before the district court, petitioners argued all post-1789 Massachusetts legislation affecting the Mashpee Indian Reservation is unconstitutional under the Commerce and Treaty Clauses, the federal Indian common law, the Non-intercourse Act and the Supremacy Clause. However, the district judge, as an integral part of his discussion on individual Indian rights, approved an 1842 Massachusetts Act which purported to individualize the Mashpee Reservation:

> "In 1842, the General Court of Massachusetts granted to the Indian Proprietors of Mashpee a limited title to up to 60 acres of previously allotted common land of the proprietorship.... Thus some Mashpee Indians did acquire individual title to land which had been held in aboriginal Indian title." *Mashpee II*, 542 F. Supp. at 804.

But just two weeks later, in a Memorandum to Counsel, the district judge contradicted himself and cast serious doubt on his earlier statement:

> "It is arguable that allotments to Mashpee tribal land made to individual Indians in 1842 were in violation of the Nonintercourse Act." *Memorandum to Counsel*, 14 July 1982.

Although petitioners brought this contradiction to the First Circuit's attention, the Court of Appeals refused to deal with it. Thus, petitioners strongly believe the First Circuit has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such departure by the district court, as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

Conclusion

For the reasons stated in the petition and this reply, petitioners believe this Court should grant their petition for certiorari and reverse the decisions below.

Respectfully submitted,

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